e.g., Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324-25 (Fed. Cir. 2009).

But because the customer uses the accused product in a more lucrative consumer electronic, plaintiffs can persuade juries that the customer would have paid far more for a license than the manufacturer. *See, e.g., Glenayre Elecs., Inc. v. Jackson*, 443 F.3d 851, 861 (Fed. Cir. 2006) (plaintiff "succeeded" at "steer[ing] the jury away from the relatively low royalty base of $40 million to the relatively high royalty base of $250 million, which was based on customer use."). For example, as one lawyer for a startup targeted by an NPE explained, the "patentee [did] not sue ... [the manufacturers] because they ... wanted the damages base to be the $400/500 price of a phone rather than the $25 price of a chip or the price (sometimes zero) of the software."[5] The plaintiff can contend the customer would have paid more to license its patent than TSMC, notwithstanding that the allegedly infringing product is identical. And the customer may have a large profit margin that can help it absorb the costs of a settlement. That creates an incentive to sue the customer and not the manufacturer.

Although some NPEs may sue the customers early, others may increase settlement demands by waiting to file suit against a customer until a product becomes successful. "Once a business chooses to rely on a particular technology, it can become expensive to

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[5] Colleen V. Chien, *Patent Assertion and Startup Innovation*, New Am. Found.: Open Tech. Inst. 13 (Sept. 5, 2013), http://tinyurl.com/ycp2dlv7.

switch, even if it would have been cheap to do so earlier." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 972 (2017) (Breyer, J., dissenting). This is particularly true for end products made up of multiple components supplied by others, where each component is like the piece to a complex jigsaw puzzle. The NPE just waits until the customer has assembled the intricate puzzle and then strikes at a key piece. This dynamic gives "a patentee [a] considerable incentive to delay suit until the costs of switching—and accordingly the settlement value of a claim—are high." *Id.*

* * *

By suing customers rather than manufacturers, NPEs decrease the risk to their patent from a validity challenge and increase the likelihood of a lucrative settlement. In the event the customer decides to fight, the patent owner can settle inexpensively with one customer and keep the strategy going with others. Furthermore, NPEs often benefit from delaying suit until the customer has committed to the manufacturer's product.

II. To Promote Progress, Congress Has Provided Manufacturers With An Effective Mechanism To Defend Against NPE Suits.

In 2011, Congress created inter partes review—a targeted administrative mechanism that enables the Patent Office to find, with the benefit of adversarial presentation, those worthless patents that stifle innovation. TSMC's experience illustrates the effectiveness of Congress's actions.

A. For many years, manufacturers could not defend their customers and their products from suits based on worthless patents.

For many years, the only avenue open to a manufacturer seeking to defend its products from a strategic suit against its customers was to seek a declaratory judgment. *See* 28 U.S.C. § 2201(a).[6] But that option often did not work. To have standing to bring a declaratory judgment action a manufacturer must show "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The lower courts have consistently held that injury from a patent owner suing a customer for using a manufacturer's product is not enough.

The case law is replete with instances where patent holders have brought infringement suits against

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[6] Although a manufacturer may also have requested an ex parte reexamination by the Patent Office, 35 U.S.C. § 303, the manufacturer has no right to participate in an ex parte reexamination once the proceeding begins. *Id.* at § 305. Moreover, the proceeding is "conducted according to the procedures established for initial examination." *Id.* Given the high volume of issued patents and the difficulty of the patent examination process, *supra* 4-5, a process that effectively repeats a process that already issued a worthless patent may well just repeat the error. Moreover, ex parte reexamination can take years to resolve validity. *See* USPTO, *Ex Parte Reexamination Filing Data—September 30, 2016*, http://tinyurl.com/y78r4mvc.

the customers of an upstream manufacturer and made clear that these suits were based on the customers' use of the manufacturer's products, yet the manufacturer was deemed to lack declaratory judgment standing. In one case, a patent holder brought suit against several customers of Cisco, a manufacturer of components for telecommunications networks. *Cisco Sys., Inc. v. Alberta Telecomms. Research Ctr.*, 538 F. App'x 894 (Fed. Cir. 2013). The patent holder "provided claim charts to the defendants which tie[d] [its] infringement contentions to the ... defendants' use of Cisco products, identified by model number, and quote[d] Cisco's product literature to describe the allegedly infringing functionality made possible by those Cisco products." *Id.* at 895. Yet the court concluded that, while it was "understandable that Cisco may have an interest in saving its customers from infringement contentions premised ... on their use of Cisco products[,] ... that interest is simply insufficient to give rise to a current, justiciable case or controversy upon which federal declaratory judgment may be predicated." *Id.* at 898.

In other instances, even where a patent holder has explicitly threatened litigation against a manufacturers' customers, courts have found that the manufacturer lacked declaratory judgment standing. In one case, the manufacturer lacked standing even though the patent holder sent letters to its customers "alleging that [the product] would infringe" its patent. *Creative Compounds, LLC v. Starmark Labs.*, 651

F.3d 1303, 1316 (Fed. Cir. 2011).[7] In another, the manufacturer lacked standing despite the manufacturer's claims that a patent holder "launched a bad faith whispering campaign" in the relevant marketplace "by making accusations and veiled threats to potential customers" and despite statements from the manufacturer's customers that they were "reluctant to buy" the manufacturer's products "because of the accusations made by" the patent holder. *Matthews Int'l Corp. v. Biosafe Eng'g, LLC*, 695 F.3d 1322, 1327 (Fed. Cir. 2012).

Indemnification is not a ready solution to secure standing either. As an initial matter, manufacturers should not be put to the choice of indemnification or being able to challenge infringement contentions leveled at their products. But even if a manufacturer is willing to indemnify, that is not always enough. Courts have held that an indemnification demand from a customer alone is not sufficient. *See Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 904 (Fed. Cir. 2014); *Proofpoint, Inc. v. InNova Patent Licensing, LLC*, No. 5:11-CV-02288-LHK, 2011 WL 4915847, at

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[7] *See also Cocona, Inc. v. Sheex, Inc.*, 92 F. Supp. 3d 1032, 1041 (D. Colo. 2015) (no standing to seek declaratory relief based on "generalized concern about potential lawsuits against its customers and licensees"); *Integrated Glob. Concepts, Inc. v. j2 Glob., Inc.*, No. C-12-03434-RMW, 2013 WL 3297108, at *4 (N.D. Cal. June 28, 2013) (no standing to seek declaratory judgment standard even though patent holder sent cease and desist letter to supplier's customers); *Bridgelux, Inc. v. Cree, Inc.*, No. C 06-6495 PJH, 2007 WL 2022024, at *9 (N.D. Cal. July 9, 2007) (no standing to seek declaratory judgment despite claims that patent holder threatened litigation against plaintiff's customers).

*5 (N.D. Cal. Oct. 17, 2011). And even when the manufacturer accedes to such indemnification demands, courts have sometimes found that interest insufficient to convey declaratory judgment standing. *See Ours Tech., Inc. v. Data Drive Thru, Inc.*, 645 F. Supp. 2d 830, 840 (N.D. Cal. 2009); *see also Shuffle Tech Int'l, LLC v. Sci. Games Corp.*, No. 15 C 3702, 2015 WL 5934834, at *8 (N.D. Ill. Oct. 12, 2015) ("Voluntary involvement in the indemnified party's litigation does not give the indemnitor the type of adverse legal interest ... necessary to satisfy *MedImmune*.").

The upshot is that patent holders are empowered to act strategically to defeat manufacturers' standing while continuing to threaten and actually initiate infringement suits against the manufacturer's customers. In case after case, courts have concluded that a patent holder could thwart a manufacturer's standing simply by avoiding threatening the manufacturer with an infringement suit. *Allied Mineral Prods., Inc. v. Osmi, Inc.*, 870 F.3d 1337, 1339-40 (Fed. Cir. 2017); *Microsoft Corp.*, 755 F.3d at 905 (no standing where claim charts mentioned Microsoft's product but did not accuse Microsoft of infringement); *see also Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1343, 1348 (Fed. Cir. 2007) (dismissing declaratory judgment action even though plaintiff was motivated to "prevent the district court from declaring the ... patent invalid").[8]

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[8] *See also Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 (Fed. Cir. 2010); *Microsoft Corp. v. LBS Innovations LLC*, No. 12-CV-0848 CCC JAD, 2012 WL 6028857,

The problem is compounded by the rise of foreign NPEs and sovereign patent funds. Josh Landau, *IPR Successes: A Bridge to Sovereign Patent Funds*, Patent Progress (Oct. 9, 2017), http://tinyurl.com/ydew9j8g. A foreign NPE can always consent to personal jurisdiction by filing suit in United States courts. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). But these entities are otherwise generally not subject to personal jurisdiction until they file suit in the United States. *See Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1021 (Fed. Cir. 2009) (holding that foreign patent holder was not subject to personal jurisdiction in a declaratory judgment action). So foreign NPEs can and do threaten manufacturers and their customers with infringement litigation without putting their patents at risk by actually filing an infringement suit. Thus, even if a manufacturer like TSMC could establish standing, it might still be unable to file a declaratory judgment action against a foreign NPE because of the court's lack of personal jurisdiction.

And the NPE problem for manufacturers does not necessarily end with suits against its customers. It

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at *1 (D.N.J. Nov. 8, 2012) (supplier lacked declaratory judgment standing because, although patent holder sued several of its customers for infringement, patent holder did not explicitly allege infringement "based upon their use of any product or service provided by [supplier]"); *Adobe Sys. Inc. v. Kelora Sys. LLC*, No. C 11-3938 CW, 2011 WL 6101545, at *4 (N.D. Cal. Dec. 7, 2011) (patent holder defeated declaratory judgment standing because, although it sent letters to supplier's customers alleging infringement, those letters did not explicitly "state that [the supplier's] products were the basis for the enforcement actions against those third parties").

also applies when an NPE decides to sue the manufacturer directly for induced infringement. The NPE can give notice of the patent to the manufacturer thereby laying the foundation for an induced infringement claim. *See* 35 U.S.C. § 271(b). But by avoiding an immediate litigation threat, the NPE can avoid triggering declaratory judgment standing and giving the manufacturer the option to challenge the patent's validity before damages begin to accrue. *Supra* 10-12. Because a good faith belief that the patent is invalid is not a defense to induced infringement, *see Commil*, 135 S. Ct. 1920, the prospect of a worthless patent suit puts the manufacturer in an impossible situation. A manufacturer can only watch potential damages accrue for induced infringement and has no forum to demonstrate that the patent is invalid.[9]

In sum, for the entity with the greatest incentive to properly address invalidity—manufacturers—the worthless patent problem became particularly vexing. NPEs often asserted worthless patents against a manufacturer's customers in a way that precluded the manufacturer from ever being able to contest the patent's validity. And, even if a manufacturer suspected an NPE would someday file a direct suit against it for induced infringement, the manufacturer would have no choice but to let possible damages accrue.

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[9] Still worse, waiting for suit has become even more of a problem for manufacturers given that NPEs have argued that a good faith belief of invalidity is not even a defense to willful infringement. *See Dorman Prods., Inc. v. Paccar, Inc.*, 201 F. Supp. 3d 663 (E.D. Pa. 2016).

B. IPRs provide manufacturers with a mechanism to defend their customers and products from suits based on worthless patents.

In 2011, Congress recognized that "low-quality patents clog the system and hinder true innovation."[10] Congress fulfilled its mandate to "promote the Progress of Science and useful Arts" by creating inter partes review—a post-grant review mechanism targeted to those questionable patents that become problematic. U.S. Const. art. I, § 8, cl. 8. Similar reexamination mechanisms are a feature of patent systems across the globe. *See* World Intellectual Property Organization, *Re-examination Systems*, http://tinyurl.com/y8brn54y/.

Inter partes review enables innovators, like TSMC, who routinely face threats based on worthless patents, to ask the Patent Office to double check the patent's validity in an expedited and economical proceeding. In that way it "allow[s] invalid patents that were mistakenly issued by the [Patent Office] to be fixed early in their life, before they disrupt an entire industry or result in expensive litigation." 157 Cong. Rec. S1326 (daily ed. Mar. 7, 2011) (statement of Sen. Sessions).

IPRs provide the solution to each of the problems identified above. IPRs enable a manufacturer confronted with a worthless patent to defend its product and its customers by making the case against validity

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[10] 157 Cong. Rec. S1036 (daily ed. Mar. 1, 2011) (statement of Sen. Klobuchar).

that the Patent Office may not have heard when it initially examined the patent application. IPRs let manufacturers resolve validity early in a design process, which makes it possible to take a license to a questionable patent that turns out to be valid without the distorting effect of a locked-in customer. And IPRs let manufacturers avoid the risk of induced infringement if they guess wrong about a patent being worthless by getting a definitive ruling on the patent's validity before they engage in allegedly infringing activities.

To illustrate, TSMC faces the problem of NPEs targeting its customers. IPRs made it possible for TSMC to challenge the patents and resolve the disputes. TSMC has sought 50 inter partes reviews against patents that have been asserted against its technology, mostly in suits against its customers. And TSMC's success rate has been notable—excluding cases that remain pending, patent owners simply surrendered their patent in 11% of cases. In another 75%, the PTAB ultimately held all challenged claims unpatentable, or TSMC favorably settled. Without IPRs, the owners of those patents would have been able to engage TSMC's customers in protracted litigation, or negotiate coercive settlements involving exorbitant licensing demands, based on patents that never should have been issued in the first place.

TSMC's recent IPR proceedings against Godo Kaisha IP Bridge are exemplary. In early 2016, IP Bridge sued Broadcom in the Eastern District of Texas for infringement of U.S. Patent Nos. 6,538,324; 6,197,696; 7,126,174; 8,354,726; RE43,729; and RE41,980. Complaint, *Godo Kaisha IP Bridge 1 v. Broadcom Ltd.*, No. 2:16-cv-00134-JRG-RSP (E.D. Tex. Feb. 14, 2016),

Dkt. 1. But Broadcom does not manufacture any of the accused devices. Order Denying Motion to Transfer Venue at 5, *Broadcom*, Dkt. 188. Instead, it purchases them from third-party foundries, including TSMC. *Id.* TSMC petitioned for inter partes review of 5 of the 6 patents at issue in Broadcom. The Patent Office granted TSMC's petitions on 3 of those patents. *See* IPR2016-01246, 01247 ('174 patent); IPR2016-01249, -01264 ('324 patent); IPR2016-01376, -01377, -01378, -01379 ('696 patent). Thereafter, the Broadcom parties settled and jointly moved to dismiss the lawsuit pending in the Eastern District of Texas. Joint Motion to Dismiss, *Broadcom* (June 30, 2017), Dkt. 335.

So too, many other manufacturers rely on the IPR process to defend products and customers from NPE suits. Major manufacturers including Cisco, IBM, Nintendo, and Oracle have used IPRs to protect their customers from infringements suits. Brian J. Love, *Inter Partes Review as a Shield for Technology Purchasers: A Response to Gaia Bernstein's* The Rise of the End-User in Patent Litigation, 56 B.C. L. Rev. 1075, 1090-91 (2015). And IPRs enabled HP, Lexmark, and Xerox to defeat a worthless patent that the NPE MPHJ had been asserting against every business it could find that used a dual printer scanner. *See MPHJ Tech. Invs., LLC v. Ricoh Americas Corp.*, 847 F.3d 1363 (Fed. Cir. 2017) (affirming PTAB).

* * *

IPRs give manufacturers the security from worthless patents they need to innovate, to protect their

customers from coercive settlements, and to maintain confidence in the patent system. With IPRs, manufacturers can protect their products from strategic lawsuits based on worthless patents. They can combat foreign NPEs who wield US patents while avoiding the jurisdiction of US courts. They can challenge validity early and resolve disputes before their customers are locked into a product and vulnerable to settlement pressure. And they solve the dilemma between paying to license a patent that never should have issued or risking infringement litigation by providing a quick mechanism for resolving validity.

CONCLUSION

To assure a patent system that promotes Progress, this Court should hold that inter partes review is constitutional.

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OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE TAIWAN SEMICONDUCTOR MANUFACTURING CO., LTD. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Taiwan Semiconductor Manufacturing Co., Ltd. (TSMC) is the most advanced semiconductor manufacturer in the world. Founded thirty years ago, semiconductors now made by TSMC include features that are 20 nanometers in size or as much as 5000 times thinner than the width of a human hair. To do this, TSMC employs thousands of engineers and spends billions of dollars a year to develop products with ever-decreasing size. And to maintain its industry lead, TSMC is expected to double its products' computing power every two years. Today, TSMC supplies to its customers the semiconductors that run many of the most popular electronic devices. TSMC believes in the value of patents that protect true innovation, and TSMC is now the company with the ninth most U.S. patents.[2]

Aware of the extraordinary volume of paper before this Court, TSMC writes to make specific points drawn from its deep experience with the American patent system. TSMC agrees with the views of Respondent set out on pages 29-39 of its brief. Patent rights are "public rights, derived from a 'federal regulatory scheme.'" Resp. Br. at 30 (citing *Stern v. Marshall*,

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] *See* TSMC, *2016 TSMC Annual Report: Technology Leadership* (Mar. 17, 2017), http://tinyurl.com/y9gsvnr9.

564 U.S. 462 (2011)). To minimize the amount of redundant argument, however, TSMC does not further directly address this question. TSMC instead offers this brief to aid the Court's understanding of the significant problems invalid patents create for manufacturers like TSMC and their customers. TSMC writes to explain why inter partes review (IPR) is critical for the patent system to promote the "Progress of Science and the useful Arts."

SUMMARY OF ARGUMENT

A patent applicant is entitled to a patent only if the United States Patent & Trademark Office (Patent Office) determines that the applicant invented something beyond "the results of ordinary innovation." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 427 (2007) (citing U.S. Const. art. I, § 8, cl. 8). But making that determination is no easy task, and hundreds of thousands of patent applications are filed each year. The inevitable result is that among the many issued patents are patents that "stifle, rather than promote, the Progress of useful Arts." *Id.*

"Some companies may use patents as a sword to go after defendants for money, even when their claims are frivolous." *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015). Owners of worthless patents, often non-practicing entities (NPEs), routinely sue manufacturers' customers rather than directly sue manufacturers such as TSMC. NPEs do so to avoid challenges to the validity of the patent because an individual customer is less likely than a manufacturer to pay the costs to litigate. NPEs also sue a manufacturer's customers to inflate the damages

demands because customers incorporate a manufacturer's component into an end product with a higher price tag. And should an NPE decide to target a manufacturer for inducing the customer to infringe, an NPE is able to generate high damages claims by giving notice of the patent and then waiting months or years to sue while the customer further commits its end product to the manufacturer's component.

IPRs are often the only mechanism for a manufacturer to protect its customers and products from the cloud of infringement. Patent owners can engage in strategic pleading to deprive manufacturers of access to Article III courts to challenge the asserted patent's validity under the Declaratory Judgment Act. Thus, for manufacturers, this case is not about the choice between contesting patent validity in Article III courts or contesting patent validity in IPRs. Rather, at stake for manufacturers is *any* mechanism to contest the validity of a worthless patent asserted against the manufacturers' customers and manufacturers' products.

ARGUMENT

I. NPEs Often Assert Worthless Patents Against Manufacturers' Customers and Products.

The framers empowered Congress to create a patent system that "promote[s] the Progress of Science and useful Arts." U.S. Const art. I, § 8, cl. 8. Today's patent system "adjust[s] the tension, ever present in patent law, between stimulating innovation by protecting inventors and impeding progress by granting

patents when not justified by the statutory design." *Bilski v. Kappos*, 561 U.S. 593, 609 (2010). And for many years, companies, including TSMC, have submitted patent applications and obtained patents protecting inventions. But since at least the 1800s, this Court has also recognized that not all patents claim true innovations. "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly." *Lear, Inc. v. Adkins*, 395 U.S. 653, 663-64 (1969) (quoting *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892)).

A. Some worthless patents are an inevitable feature of any patent system.

Given the prominent place of technology in today's economy, the erroneous issuance of some patents is unavoidable. As the Federal Respondent writes, "the patent examiner evaluating an application may be unaware of information that bears on whether the requirements for patentability are satisfied." Br. Federal Respondents at 3 (citing *Kappos v. Hyatt*, 566 U.S. 431, 437 (2012) and *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 108-112 (2011)). "[T]hird parties are often in the best position to challenge a patent application [and] [w]ithout the benefit of this outside expertise, an examiner might grant a patent for technology that simply isn't a true invention."[3] Thus, "while patent examiners generally are highly skilled in both technology and patent law, they do nevertheless occasionally make mistakes and issue

[3] 157 Cong. Rec. S1036 (daily ed. Mar. 1, 2011) (statement of Sen. Klobuchar).

claims that should not have been issued." Br. Amicus Curiae PTAB Bar Ass'n at 13; *see also id.* at 15 ("problems are inherent in any examination system of patents").

The presence of improperly-issued patents complicates inventing for TSMC. Such a patent claims a monopoly on an idea that already existed. A TSMC inventor that comes across the patent may reasonably believe the patent to be no impediment to a new and useful semiconductor product. But until rendered invalid, the patent can be asserted against TSMC's products. TSMC is thus confronted with a dilemma when facing a patent that it believes invalid: It can either risk patent infringement suits against its products or pay for a license it believes it does not need.

B. Owners of worthless patents often sue manufacturers' customers.

A patent owner can typically sue anyone down the supply chain for infringement. 35 U.S.C. § 271 (granting patent owner right to exclude others from making, using, selling, or offering to sell an invention). NPEs take great advantage of their ability to pick their defendant: NPEs often sue manufacturers' customers rather than manufacturers. NPEs have found that customers are more lucrative targets. The reason is both a matter of a customer's diminished incentive to resist settlement pressure and the prospect of greater damages.

Diminished Incentives to Contest A Worthless Patent. When a manufacturer's product is accused of infringing a questionable patent, the

manufacturer has every incentive to challenge the asserted patent's validity. The infringement suit is in essence the plaintiff claiming that it invented the manufacturer's product. And the manufacturer faces exposure for every product it sold to its customers and every product it may sell in the future. Until the manufacturer either settles or a court finds the asserted patent invalid or non-infringing, its product will remain under a cloud of infringement and its business may be at risk. This gives manufacturers a strong incentive to contest baseless patent claims with the industry knowledge and expertise needed to do so.

For customers, the incentives often look different. *See* Scott Partridge & David Mika, *Looking Upstream: Weighing Proposed Changes to Customer Stays in Patent Litigation*, 4 Houston L. Rev. 81, 84-86 (2014). Defending against a claim of infringement is expensive.[4] And an infringement claim based on a supplied component will sometimes target only a small part of the customer's business. The customer may also have the option of simply switching to a new product for less than it would cost to fight. Or they may believe the manufacturer will foot the bill for any settlement. The result is that the customer has a diminished incentive to defend against the infringement allegations and will typically have an incentive

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[4] According to the American Intellectual Property Law Association, in cases where between $1 million and $25 million is at risk, a patent owner should expect to spend more than $2 million to litigate a patent through trial and appeal. In high stakes litigation the *median* cost is $5,000,000—which means half of such suits cost even more. Samson Vermont, *AIPLA Survey of Costs of Patent Litigation and Inter Partes Review* (Jan. 30, 2017), http://tinyurl.com/ybnpne3c.

to settle even if they believe they would ultimately prevail. *See* Colleen V. Chien & Edward Reines, *Why Technology Customers Are Being Sued En Masse For Patent Infringement And What Can Be Done*, 49 Wake Forest L. Rev. 235, 243 (2014).

Indeed, for this reason, the Federal Circuit even recognizes "that, in certain patent cases, 'litigation against or brought by the manufacturer of infringing goods takes precedence over a suit by the patent owner against customers of the manufacturer.'" *See Spread Spectrum Screening LLC v. Eastman Kodak Co.*, 657 F.3d 1349, 1357 (Fed. Cir. 2011) (quoting *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990)); *see also Tegic Commc'ns Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335, 1343 (Fed. Cir. 2006). This is because of "the manufacturer's presumed greater interest in defending its actions against charges of patent infringement; and to guard against possibility of abuse." *Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1081 (Fed. Cir. 1989).

Inflated Claims of Damages. Plaintiffs target customers rather than manufacturers for a second reason: They can demand greater damages from the manufacturer's customers than they can reasonably seek from the manufacturer even though the allegedly infringing component is identical in both cases. The reason is how patent damages are measured. Typically, a plaintiff that proves infringement is entitled to a "reasonable royalty" for its contribution. 35 U.S.C. § 284. The reasonable royalty is determined by a hypothetical negotiation that seeks to tease out what an infringer would have paid for a license. *See,*